

REMARKS

The Examiner has made the Office Action final. Applicant requests withdrawal of the finality of this Office Action.

The first Office Action, dated April 7, 2006, received for this application contained only obviousness-type double patenting objections. On July 6, 2006, Applicant responded by filing appropriate terminal disclaimers, and therefore overcame all objections.

Subsequently, Applicant's attorneys received a telephone call on August 16, 2006 from the Examiner advising that if the claims were limited to "an expiratory limb", the Examiner would allow the claims. However, if Applicant did not include the suggested limitation, the Examiner would cite United States Patent No. 6,523,538 to Wikefeldt.

In response on August 18, 2006, Applicant rejected the Examiner's proposed Amendment. Applicant advised the Examiner that we would submit a proposed amendment to the claims to more clearly recite that the claimed construction was flexible conduit suitable for conveying breathing gases to or from a patient. This proposed Amendment was submitted on August 21, 2006. Applicant also submitted arguments that the claims were patentable because the cited prior art did not disclose a *flexible* conduit nor an elongate heating element, and was not suitable as claimed.

For reasons Applicant does not understand, it appears that the Examiner did not consider the draft amendment submitted on August 21, 2006 and issued a non-final Office Action dated September 21, 2006 (this Office Action states that it is responsive to the paper filed on July 14, 2006, but no such response was filed that day; a response to the obviousness-type double patenting Office Action was filed on July 6, 2006). Despite repeated phone calls to the

Examiner, the Examiner did not provide any response regarding whether the proposed amendments were considered or provide any other thoughts regarding the proposed amendments. This required Applicant to formally present them in an Amendment filed on March 19, 2007 in order to have them considered.

5 Thereafter, the Examiner issued the present Final Office Action, but has not stated why the Office Action has been made final. Thus, in view of the facts regarding prosecution of this application, Applicant contends that the finality of this Office Action is premature and requests withdrawal of the finality.

10 Claims 1, 3, 5 and 6 were rejected under 35 U.S.C. §102(b) as allegedly being anticipated by UK Patent Application No. 2 252 515 to Zwaan, which is newly-cited. The Examiner alleges anticipation of the claims based on prior art which clearly does not disclose a *flexible* conduit nor an elongate heating element, nor is it suitable as claimed. It is Applicant's view that Zwaan is no more relevant than the previously-cited prior art. The reasons why Zwaan is not relevant are exactly the same reasons argued previously in relation to Kirkpatrick (United States Patent No. 15 3,677,329). The deficiencies in these documents as prior art are strikingly similar.

20 Zwaan does not anticipate the claims of this application. The Examiner remarks that Applicant's arguments with respect to claims 1 and 10 have been considered, but are moot in view of the new grounds of rejection. However, this is absolutely untenable because the new grounds of rejection based on Zwaan are not sustainable for the same reasons as those alleged in view of Kirkpatrick. Zwaan does not disclose a flexible conduit, but rather discloses a rigid housing in the same way that previously-cited Kirkpatrick disclosed a rigid housing.

Similarly, Zwaan does not disclose "at least a region of said enclosing wall being of a material that allows the passage of water vapour without allowing the passage of liquid water or respiratory gases" as specified in the pending claims. From a study of Figure 7 of Zwaan, it is very clear that the microporous wall 40 does not comprise an enclosing wall defining a conduit between inlet 2 and outlet 3. Further, the heating element 50 (shown in Figure 5) is clearly not elongate as required by claim 1.

Applicant requests that the Examiner consider the arguments based on the fact that the newly-cited prior art is merely cumulative, and requests the Examiner's explanation as to how Zwaan is considered to be significantly different to Kirkpatrick.

Therefore, Applicant submits that the rejection should not have been made final and the claims are patentable over the prior art. Reconsideration and withdrawal of the rejection is requested.

Should the Examiner have any questions regarding this Amendment, the Examiner is invited to contact one of the undersigned attorneys at (312) 704-1890.

Respectfully submitted,

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